IN THE

Supreme Court of the United States

October Term, 1963

No. 370

ROBERT ZANE and HERBERT GILMORE,

Petitioners,

AGAINST

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioners, Robert Zane and Herbert Gilmore, respectfully pray that a Writ of Certiorari issue to review the decision (Appendix A) and judgment (Appendix B) of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Florida wherein petitioners were tried and convicted for violating the Anti-Fraud provisions of the Securities Act of 1933, 15 U. S. C. A. §77(q)(a), the Mail Fraud Statute, 18 U. S. C. A. §1341, and the Conspiracy statute, 18 U. S. C. A. §371.

Opinion Below

The United States Court of Appeals for the Fifth Circuit rendered its opinion set forth herein as Appendix A. No formal opinion was rendered in the United States District Court for the Southern District of Florida on petitioners' motion for a mistrial or on petitioners' application to suppress evidence predicated upon illegal search and seizure, but the oral decision of the Court is contained in the record (37, 42) with respect to the motion for a mis-trial and at (342-344) with respect to the motion to suppress.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, U. S. C. §1254 and petitioners' cause is founded, in addition, upon rights secured by the Constitution of the United States and specifically the Fourth and Fourteenth Amendments thereto.

Questions Presented for Review

1. The first five (5) counts of the indictment charge a violation of the Anti-Fraud provisions of the Securities Act, 15 U. S. C. A. §77(q)(a) in that, the defendants in the sale of securities devised and employed a fraudulent scheme to defraud and used the United States Mails in furtherance of the said fraudulent scheme. This indictment charges each mailing in furtherance of the scheme as a separate crime. Petitioners have been convicted of four (4) of the five (5) Securities Act counts charged in the indictment and have received consecutive sentences of two (2) years on each such count making a

total of eight (8) years imprisonment on these counts. Other jurisdictions hold that each mailing or use of the mails does not constitute a separate crime or offense, the gist of the crime being the fraudulent scheme employed in the sale of securities; holding that the use of the mails is incidental to and requisite merely to give jurisdiction to the Federal Courts. This statutory provision is the subject of conflicting decisions in different Courts of Appeals in the United States. The question presented is whether under the statute each mailing constitutes a separate crime or offense or whether there is but one crime or offense charged irrespective of the number of mailings involved.

2. Counts 6 through 10 of the indictment allege a violation of the Mail Fraud Statute, 18 U. S. C. §1341 and set forth five (5) separate mailings constituting five (5) separate crimes. Petitioners have been convicted on four (4) of such counts and have received four (4) consecutive two (2) year sentences making a total of eight (8) years imprisonment on these counts. The indictment discloses that the identical acts of omission, commission and course of conduct by petitioners during the same period of time in some jurisdictions give rise to but one violation of law under the Securities Act, 15 U. S. C. 77(q)(a) and yet give rise to multiple crimes under the Mail Fraud Statute, 18 U. S. C. §1341. It is alleged that each mailing constitutes a separate crime under the Mail Fraud Statute whereas each mailing does not constitute a separate crime under the Securities Statute. The question is whether the omission or commission of identical acts at identical times can give rise to multiple, separate, mutually exclusive crimes which would subject petitioners to totally different punishment and sentences by the Court based upon the format of the indictment. The

question is whether a single, continuing transaction and course of conduct may be split into more than one count of the indictment in order to prolifgrate penalties.

3. At the inception of the trial the record discloses that co-defendants of petitioners Robert Zane and Herbert Gilmore, were brought into Court in the presence of jurors and prospective jurors in shackles and handcuffs. The question presented is whether the denial of the motion for a mis-trial on this ground was a denial of due process of law and a denial of a fair trial to petitioners herein.

4. Books and records of Insured Capital Corporation, a Florida corporation, were used in evidence against petitioners upon the trial. The books and records were obtained by the County Solicitor of Orange County, Florida, pursuant to a subpoena and the books and records were turned over to the County Solicitor by an employee not an officer or person in authority of Insured Capital Corporation. On the eve of trial they were turned over to the United States Attorney in charge of the prosecution of the trial of this indictment by the County Solicitor of Orange County, Florida. Thereafter when the trial began, a subpoena for their production upon the trial was first served upon the County Solicitor of Orange County, Florida, requiring the production upon the trial of books and papers already in the possession of the United States Attorney. Concededly no search warrant was ever issued for their production and use. The question presented is whether the motion made by the petitioners Robert Zane and Herbert Gilmore during the trial to suppress such evidence as having been illegally obtained in violation of the Constitution of the United States was erroneously denied by the Court.

5. The question presented is whether there is an unconstitutional and unlawful delegation of power and discretion vested in an administrative official; to wit, the United States Attorney, to determine and decide what crimes shall be charged against defendants based upon the commission of the same acts or omissions and based upon the same conduct complained of and further, what sentences of imprisonment might be imposed upon a defendant based upon such acts of omission, commission or conduct which gives rise to violations of several penal statutes. The indictment in the case at bar sets forth identical acts which it is alleged are five (5) violations of the Securities Act, 15 U. S. C. A. §77(q)(a), five (5) violations of the Mail Fraud Statute, 18 U. S. C. A. §1341 and one (1) violation of the conspiracy statute, 18 U. S. C. A. §371. The transcript of proceedings before the Grand Jury as well as the trial of the indictment, disclosed that the United States Attorney has the power, authority and discretion to determine which violations of statute should be alleged and tried and which punishments and sentences the defendant must face for acts of omission or commission applicable to three separate statutes.

Statements of Facts

The facts in the indictment allege that petitioners participated in the formation of Insured Capital Corporation, a Florida corporation in October, 1959 and engaged in the business of selling chattel mortgage notes to the public, payable within a period of one (1) year, bearing interest at eight (8%) percent per annum. The mortgage notes were to be secured by collateral derived from various financial investments of Insured Capital Corporation, including mortgages on automobiles and other high interest-bearing investments.

It was alleged that the defendants pocketed the proceeds of the sale of the mortgage notes of Insured Capital Corporation, never engaged in any proper business operations, and falsely and fraudulently represented to the public in the solicitation of money for the sale of such mortgage notes, matters which were false and untrue in many respects.

Prior to trial, application was made for discovery of all of the corporate books and records of Insured Capital Corporation, and the United States of America failed to disclose that they had either possession or control of the books, records and files of Insured Capital Corporation.

However, upon the trial it appeared that the books and records of Insured Capital Corporation had been obtained by the County Solicitor of Orange County, Florida, allegedly pursuant to a subpoena. The books and records were turned over to the County Solicitor by an employee, not an officer, of Insured Capital Corporation, and on the eve of the trial they were turned over to the United States Attorney in charge of the prosecution of this action. A subpoena for their production upon the trial was first served the day the trial began, after the documents in question were already in the possession of the United States Attorney.

No search warrant was ever issued in either the State or Federal Courts in connection with such books and records.

The defendants immediately made application to suppress the books and records of Insured Capital Corporation, predicated upon their acquisition as a result of an unlawful and illegal search and seizure by the officials of the State of Florida, and upon the further ground that their wrongful search and seizure by state officials

precluded their subsequent use by the Federal authorities upon the trial of this indictment. This motion, made during the trial, was denied, although it was and is contended that the search and seizure was illegal, a violation of the constitutional rights of the defendants.

At the inception of the trial, motions for a mistrial were made predicated on the fact that co-defendants of petitioners Zane and Gilmore were brought into the Court Room in shackles in the presence of sworn and prospective jurors (S. M., p. 34). In spite of this manifest prejudice, the motions were denied.

Each petitioner herein denied knowledge of any wrongdoing by the principals of Insured Capital Corporation.

Petitioners Zane and Gilmore contended throughout the trial that they had nothing whatever to do with this corporation, being neither stockholders, officers, directors nor persons in any way interested in the financial or other affairs of the corporation.

The verdict of the jury was to the contrary.

Petitioners were found guilty of nine (9) counts of the indictment and received nine (9) consecutive two (2) year terms of imprisonment, making a total of eighteen (18) years imprisonment to be served.

The Court of Appeals sustained the verdict of the jury based upon the evidence before the trial court.

Reasons for Issuance of the Writ

The holding of the Court of Appeals, affirming the judgment of conviction of the multiple counts of this indictment, raises questions of substantial importance and wide-reaching consequences and impact.

1. The Federal statutes involved are the subject of conflicting decisions in different Courts of Appeals in the United States requiring that such conflict be resolved by this Court.

The construction of the Securities Act, Title 15 U. S. C. §77(q)(a), has been the subject of diverse, inconsistent holdings in various Courts of Appeals of the United States.

In *United States v. Hughes*, D. C. N. Y., 1961, 195 F. Supp. 795, the Court consolidated multiple counts of an indictment under 15 U. S. C. §77(q)(a) holding that each mailing did not constitute a separate crime and basing its statutory construction on *United States v. Cashin*, C. C. A. 2d 1960, 281 F. 2d 669, stating the rule as follows:

> "Defendant contends that counts 1 to 15 inclusive, all charge one and the same offense. Each alleges that all defendants caused to be carried through the mails on a certain date certain matter enclosed in an envelope bearing a certain address. They differ only in that each alleges a different mailing.
>
> The statute in Section 17(a) makes it unlawful 'in the offer and sale of any securities by the use of any means of instruments of transportation or communication in Interstate Commerce or by the use of mails, * * * *to employ* any device * * * or *to obtain* money * * * or *to engage* in any transaction (emphasis supplied).
>
> "The gist of the crimes charged in the indictment as in most Securities Act cases, is the fraudulent

scheme employed in the sale of securities. See *United States* v. *Robertson*, D. C. N. Y., 1959, 181 Fed. Supp. 158, *United States* v. *Monjar*, supra. The purpose of the requirements that there be a use of the mails or other facilities of commerce is solely to create a basis for Federal jurisdiction. *Cresswal-Keith, Inc.* v. *Willingham*, 8th Cir. 1959, 264 Fed. 2d 76, *Schiller* v. *H. Vaughan Clarke & Co.*, 1943, 134 Fed. 2d 875, *United States* v. *Robertson*, supra."

Since the gist of the crime is the fraudulent scheme and the purpose of the requirement that there be a use of the mails or other facilities, is solely to create a basis for federal jurisdiction, * * * the multiple mailings in carrying out the scheme do not constitute separate crimes. Each device to defraud or each obtaining money by false statements or other transactions which operate as a fraud, may be a separate crime but not each use of the mails or Interstate Commerce."

The Court of Appeals for the Fifth Circuit has held diametrically to the contrary to the holding of the Court of Appeals in the Second Circuit wherein petitioners have been convicted and sentenced on four (4) separate counts of a violation of Title 15 U. S. C. 77(q)(a) holding each separate mailing in furtherance of the scheme to defraud is a separate crime.

This manifest inconsistency in the holdings of the Courts of Appeals should be resolved by this Court and petitioners' sentence reviewed and reduced accordingly.

2. The record discloses that co-defendants of petitioners herein were brought to the Court House and brought into the Court Room in shackles and handcuffs

by United States Marshalls in full view of sworn and prospective jurors. A motion for a mistrial was immediately made predicated upon this manifest prejudice, a denial of a fair trial and due process of law. The denial of a mistrial by the Trial Court and the refusal of the Court of Appeals to recognize this manifest injustice, is sanction for such future conduct of United States Marshalls in the custody and care of prisoners awaiting trial, being brought to trial and being brought before the Court.

It is self-apparent that the presumption of innocence has been manifestly impugned upon by this conduct in the presence of the jury and prospective jurors. The resulting prejudice requires a new trial and that the United States Marshalls and other law enforcement officers be guided in their conduct so as to guarantee a fair and proper trial to both defendants and co-defendants in such circumstances.

3. The multiple, cumulative sentences imposed by the Court on petitioners is improper, not in accord with the applicable decisions of this Court nor in accord with decisions existant in various Courts of Appeals throughout the United States.

The indictment in the case at bar charges the defendants with a series of continuing acts and conduct constituting the crimes alleged in the indictment. Although eleven (11) counts are set forth in the indictment as separate crimes, a reading of the indictment makes it apparent that there is but one course of conduct complained of which gave rise to the multiple crimes charged in the indictment. The Courts have uniformly held that one act or course of conduct which is violative of separate and independent criminal or penal statutes should not

give rise to more than one prosecution or more than one punishment.

> Cf. *United States* v. *Greenberg*, D. C. N. Y. 1962, 30 F. R. D. 164;
> *Nelms* v. *United States*, C. A. Va. 1961, 291 F. 2nd 390.

In the case at bar the several offenses charged in the indictment arise out of a single transaction. However, they give rise to eleven (11) separate counts and subjected petitioners to eleven (11) separate punishments. The Court has imposed nine (9) separate punishments and the Court of Appeals for the Fifth Circuit has sanctioned the sentence imposed.

In *George B. Petite, petitioner* v. *United States of America*, October Term, 1959, Supreme Court, the Solicitor General moved to vacate a judgment of conviction and dismiss an indictment where the defendant had been convicted in the State Court of a crime arising out of the same transaction which formed the basis of the indictment and judgment of conviction in the Federal Court. The Solicitor General's brief in support of the motion to vacate, set forth the following observation:

> "It has generally been the policy of the Federal Government that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by the considerations both of fairness to defendants and of efficient and orderly law enforcement."

If any of the eleven (11) counts in the indictment at bar were prosecuted in the State Courts, any one conviction in the State Court would have brought the eleven

(11) counts in this indictment within the interdict and policy set forth in the Solicitor General's brief (*supra*). Succinctly, if there had been a prosecution and conviction in the Courts of the State of Florida for larceny involving one transaction set forth in this indictment, it would have been within the policy of the United States of America to vacate all eleven (11) counts of this indictment and dismiss the indictment against petitioners herein.

A *fortiorari*, in the instant case, where all eleven (11) separate counts are pending before the same Court arising out of the same transaction.

It is respectfully submitted that the multiple sentences imposed by the Court are contrary to the policy of the United States, the intendment of statutory law and due process of law.

CONCLUSION

For the reasons above stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20003

JOSEPH A. PEEL, JR., JOHN JOSEPH CRANE, ROBERT BERNARD SILLS, ROBERT ZANE and HERBERT GILMORE,
Appellants,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

May 8, 1963

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

TUTTLE, Chief Judge: These are separate appeals on behalf of the five appellants who were tried and convicted in the Southern District of Florida for violating

the anti-fraud provisions of the Securities Act of 1933, 15 U. S. C. A. §17(q)(a), the Mail Fraud Statute, 18 U. S. C. A. §1341, and the conspiracy provisions of the criminal Code, 18 U. S. C. A. §371. A sixth alleged conspirator, Holzapfel, named in the indictment, was granted a continuance and severance for trial. Certain counts of the indictment and certain overt acts of the conspiracy count were dismissed on motion of the Government prior to the submission of the case to the jury. The jury then found the appellants guilty on all nine counts submitted to them.

The grounds of the appeal may be divided generally into three categories. The first, applicable to all the appellants, is their contention that the indictments and convictions were based on evidence which was obtained by the Government as the fruits of an illegal seizure. The second is the contention, made separately, on behalf of all except Peel, that the evidence was insufficient to warrant submission of their respective cases to a jury. The third is based on alleged errors of the trial court having to do with overruling objections to the introduction of testimony and on other actions of the trial court.

We deal first with the contention of the defendants that the trial court erred in not suppressing, and in not excluding from evidence, the books and records of Insured Capital Corporation, the corporate vehicle through which the Government sought to prove the defendants carried on their fraudulent scheme. These books and records were obtained from the office of Insured Capital Corporation in Orlando, Florida, where they were in the formal custody of a Miss Edminson, who was the Secretary-Treasurer of the corporation. The record made before

the trial court on the motion to suppress, and in support of subsequent objections to the introduction of the records in evidence, shows that none of the appellants was an officer or director of the corporation at the time the records were obtained. Evidence which both the trial court and the jury could believe tended to prove that three persons, Peel, Holzapfel and one Miles, who testified on behalf of the Government and who was named as a co-conspirator, but not as a joint defendant in the prosecution, were the principal operators of the business that had been transacted at the office of Insured Capital Corporation. There was also evidence that Sills and Crane had both been engaged under the direction of the first named three persons in carrying on certain of the functions of the business, and that Zane and Gilmore had been present in Orlando or the office of the corporation only once or twice and held no office or position with the company.

In this state of affairs, the County Solicitor of Orange County, Florida, acting under a Florida statute, Section 32.20,[1] caused a subpoena duces tecum to be served on Miss Edminson to produce all of the books, ledgers, stock certificate books, bank records, and all other documents relating to the operation of Insured Capital Corporation. Miss Edminson complied with this subpoena and turned the corporation's books over to the state officer without demur or complaint. These records were retained in the office of the County Solicitor for approximately a year

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[1] "To have process.—The County Solicitor is allowed process of his court to summons witnesses to appear before him in or out of term time, at such convenient places and time as may be designated in the summons to testify before him as to any violation of the criminal law which they may be interrogated."

and a half without any demand being made for their return or any effort being made by the corporation, any of its officers, or any of the appellants seeking a return of the books. It does not appear that there was any office of the corporation maintained thereafter to which the books could be returned, or that there was any officer of the corporation who was interested in receiving them.

During the period of their custody by the County Solicitor's office, they were made available to investigators from the Securities & Exchange Commission and other federal agencies. Based at least in part on information obtained from the records, indictments were drawn and presented to the Federal Grand Jury, charging these appellants and Holzapfel with the offenses on which they have now been convicted. The books and records were actually subpoenaed by the United States Attorney a short time before the trial, after they had been physically surrendered by the County Solicitor's office to the United States Attorney's office for use on the trial.

Appellants contend that the acquisition of the records in this manner was an illegal seizure in violation of the Federal Constitution, and that under the principle announced in *Jones v. United States*, 362 U. S. 257, and *Henzel v. United States*, 5 Cir., 296 F. 2d 650, a decision by this Court, they have sufficient standing as "aggrieved persons" to have the documents suppressed when sought to be used against them.

It is clear that the *Jones* case, while greatly relaxing the requirement as to the interest an accused must have in order to have standing to attack an illegal search or

seizure, does not cover the factual situation such as here before us. In *Henzel* v. *United States*, this Court found that where a Federal Investigating Officer, by agreement with a state court receiver of a corporation which was wholly owned and wholly operated by the accused, obtained delivery of all of the corporation's and some of the accused's personal papers in an investigation that was being conducted against the accused, the seizure of the papers was illegal and the accused had adequate standing to attack the seizure. In arriving at this conclusion, however, this Court made the following caveat:

> "This is not to say that every employee of a corporation can attack the illegal seizure of corporate property if the fruits of the search are proposed to be used against him. Each case must be decided on its own facts. We only hold, under the facts presented here, the appellant had a sufficient interest in the property seized and premises searched to enable him to challenge the propriety of the Government's conduct under Rule 41(e)."

Here the subpoena duces tecum ran to the corporation and was served on the Secretary-Treasurer, the only person in charge of the corporation at the time of service. Appellants did not allege in the trial court that this acquisition of the records by the County Solicitor's office was itself illegal under the laws of the state of Florida. Nor did they allege that the Florida statute authorizing it violated the Federal Constitution. They do here in the Court of Appeals for the first time seek to attack the legality of this seizure by the state officials. Nevertheless we do find that the trial court, in passing on the motion to suppress, made a finding to the following effect:

Appendix A

> "The property in controversy was possessed by an official of the State of Florida pursuant to legal process. The Court further finds and holds that the property thus seized was obtained in (sic) the possession of officials of Orange County, Florida, until it was delivered to the United States Securities & Exchange Commission for use in the prosecution of this case, and that such property is now lawfully in control and possession of the United States Attorney for this District."

Thus it appears that for a period of more than a year the County Attorney's office was in possession of the papers, subject to the right of any person having a legal interest in them to seek their return; during this time the corporation ceased operating, if in fact it had ever been operating in the true sense of the word, and during the entire period of time no persons showed the slightest interest in these papers, or their custody. During this period, they were inspected by the Government agents and subsequently subpoenaed for use on the trial. We think we do not come to the question whether these appellants had standing to attack the seizure, because we find nothing in these circumstances that constitutes an illegal seizure even as to the corporation itself. As the proper custodian of the records of the corporation, Miss Edmunson had a right to act on behalf of the corporation to surrender the records to a public official on proper request, either with or without a formal subpoena duces tecum. Such surrender would be binding on the corporation. It has long been held that while a corporation is protected by the illegal search and seizure provisions of the Fourth Amendment (*Silverthorne Lumber*

Co., Inc. v. *United States*, 251 U. S. 385, that very case recognizes that a corporation's papers, unlike those of an individual who is to be prosecuted, are subject to subpoena. In commenting on *Linn* v. *United States*, 251 Fed. 476, the Supreme Court said:

> "In Linn *v.* United States . . . it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers; the rights of a corporation against unlawful search are to be protected *even if the same result might have been achieved in a lawful way.*" (Emphasis added)

Clearly the lawful way of achieving this result was by issuing a subpoena to cause the corporation's books to be produced. This is the basis of the decision in *Linn* v. *United States*. See also *United States* v. *White*, 322 U. S. 694 and *Hale* v. *Henkel*, 201 U. S. 43. Both of these cases explicitly deal with the right to subpoena a corporation's books, even though such books may tend to incriminate an officer or other person connected with the corporation.

There was, of course, available to the corporation the right to move to quash the subpoena, a matter to be tried by the Florida court before complying with the subpoena. See *Vano* v. *State*, 85 So. 2d 133. The availability of this right to a hearing before compliance satisfies the requirements of due process.

We next turn to the contentions by the several appellants that the evidence is not sufficient to warrant their conviction. We have carefully read the record references dealing with the testimony by which the Government seeks to tie Zane and Gilmore into the illegal acts. It is clear that the jury could believe that Peel, Holzapfel and

Appendix A

Miles had several conversations with these two appellants in their Miami office, and that together they worked out the plan which was actually put into effect—that is, that a company would be set up which would purport to sell its promisory notes to the investing public, which notes would bear interest at 8% and which purported to be secured by valid loans held by the company representing automobile or furniture chattel mortgages or purchase money notes, whereas in fact all of the proceeds from the sale of the notes by the corporation would be divided among the participants of the scheme. Moreover, we think it plain that the jury could believe testimony to the effect that substantial sums were actually paid for the benefit of Zane and Gilmore to their nominee, Mr. Bobbs Autos. Appellants attack the testimony dealing with the association of Zane and Gilmore with the operation on the ground that it was given substantially by a single witness, Miles, who was an admitted participant in the fraudulent transaction. While this circumstance leaves it open to the jury to view the testimony with skepticism, it does not destroy its weight or sufficiency once it is accepted as true by the jury. Once the trial court charged the jury adequately with respect to accomplice testimony, the jury could base its conviction entirely on the testimony of such accomplice. *Eyles v. United States*, 5 Cir., 249 F. 2d 744. Moreover as to part of Miles' testimony, there was corroboration. Gilmore and Zane were shown to have at least some interest in purchasing of the furniture for the Orlando operation from a furniture dealer in Miami. Miss Edminson testified that they came to the Orlando office "once or twice", that they "came in early one morning and left after

dinner," and that they talked with Miles and Crane, Sills and Peel. Furthermore, one of the checks drawn payable to Mr. Bobbs Autos, appears to have been endorsed by Zane. We conclude that the jury's verdict finding these two appellants participants in the crime was amply supported.

Looking next at the evidence seeking to implicate Sills and Crane, we find that in the latter period of the operation Crane was actually president of the company at a time when the investors were being bilked out of their so-called investments. Moreover the books and records of the corporation show that from March, 1960, to September, 1960, checks for $148,000 were made payable to Crane. Sills was a salesman whose only defense seems to have been that in making his sales he did not know that the corporation was a complete fraud. He used the names of Miles and Crane on some occasions. The fact that Sills himself participated in the false representations to some of the investors and, for substantial commission, caused substantial sums to be invested in the company which were thereafter used in a manner inconsistent with the representations brings him, as does the testimony against Crane, within the language of a recent case of this Court. We believe that the jury might well have believed, as we stated in *Sherwood v. United States*, 5 Cir., 300 F. 2d 603, 605, that it "was inconceivable that he did not know anything about the stock he and his salesmen were selling, especially in view of the fact that the Continental stock was virtually the only stock they were selling for an eight or nine month period."

Appellant Peel does not contend that there was not sufficient evidence on which the jury might find him guilty of the crimes charged. The investors' testimony, together with that of Miles, clearly prove that the Government's main contention with respect to the fraudulent transaction and the use of the mails pursuant thereto, as well as the conspiracy, were sufficiently proved to go to the jury as to all defendants.

We have carefully considered the contentions of Sills and Crane that the trial court deprived them of a fair trial by reason of "inflammatory and prejudicial statements." We conclude that appellants have made no such showing as this Court referred to in *Kowalsky* v. *United States*, 5 Cir., 290 F. 2d 161, where we said that with respect to such an attack there must be a "clear showing . . . that the conduct was such as to carry a prejudice with it." " There must be something more to justify a retrial than a mere suspicion or feeling that prejudice may have resulted from this course. It must appear plain and clear." In this long trial, the trial court showed no leanings which could reasonably be calculated to prejudice either the accused or the Government.

Equally without merit is the contention made by Sills and Crane that they were brought into the courtroom on the first day, prior to the commencement of the trial, with handcuffs on. The trial court sought to ascertain whether any of the jurors observed anything of this nature, and this investigation failed to show any of them noticed their entrance at all and thus failed to show any prejudice to the appellants.

The contention on Peel's behalf that he was prejudiced by an inadvertent remark during argument of

counsel for appellants Crane and Sills to the effect that Peel and Sills had not testified, does not warrant a determination by this Court that Peel was prejudiced by such remark which was inadvertently made by counsel for a co-defendant. The court took immediate and prompt action to correct the error. The case is quite different from *DeLluna* v. *United States*, 5 Cir. 308 F. 2d 140.

We have considered the other contentions made by the appellants but find that there is no merit in any of them. The judgment of the trial court, is therefore,

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 20003

D. S. Docket No. 1270—Ore. Crim.

JOSEPH A. PEEL, JR., JOHN JOSEPH CRANE, ROBERT BERNARD SILLS, ROBERT ZANE and HERBERT GILMORE,

Appellants,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 8, 1963

Issued as Mandate: